80-789

Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD HAYDEN,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL,
FLORIDA

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ISSUES PRESENTED FOR REVIEW

1. Whether, consistent with the Sixth and Fourteenth Amendments and this Court's decision in Stromberg v. California, 283 U.S. 359 (1931), a trial court can refuse to instruct the jury on an essential element of the crimes charged, to wit, criminal intent, and an appellate court affirm the resulting conviction when there is no way of telling from the jury's general verdict that it disregarded the erroneous law and instead convicted on the basis of an alternative theory of guilt, to wit, aiding and abetting, as to which it was correctly instructed?

2. Whether the record evidence is sufficient to reasonably support a finding of guilt beyond a reasonable doubt when the prosecution's own evidence shows that Petitioner never exercised dominion and control over the marujuana on the ship and that he never had any intent

to possess or import the marijuana?

3. Whether the Eighth and/or the Fourteenth Amendments are violated by state penal statutes construed and applied to impose strict criminal liability and severe felony penalties upon a non-intentional, unwitting and unwilling individual -- in this case a passenger on a marijuana smuggling ship -- for possession based drug crimes?

4. Whether once a ship is reduced to the dominion and control of the authorities, is immobilized and no exigent circumstances remain, may warrantless searches of and seizures from the ship's repositories nonetheless be conducted without offending the Fourth Amendment?

5. Whether searches made by officers pursuant to an unconstitutional and invalid administrative regulation authorizing them to conduct warrantless searches

without probable cause, articulable suspicion, or any other standard of individualized objective facts can, consistent with the policies of the Fourth Amendment, be validated after the fact by a hindsight judicial determination of probable cause substituted for the officers' own exercise of proper discretion?

6. Whether the administrative law doctrine that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based", SEC v. Chenery Corp., 318 U.S. 80, 87 (1947), should be incorporated into Fourth Amendment law as a rule by which the actions of officials should be reviewed at hearings upon a motion to suppress evidence?

7. Whether the initial boarding and search of the ship in this case was supported by probable cause?

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STATE OF FLORIDA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL,
FLORIDA

Richard Hayden petitions for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal in his case.

OPINIONS BELOW

The trial court's orders denying Petitioner's motion to suppress and his post-trial motion appear in the Appendix hereto (App. 1, 2). The Florida Supreme Court's order transferring jurisdiction to the Florida Second District Court of Appeal is reported at 372 So.2d 444 (Fla. Sup. Ct. 1979) (App. 5). The Second District Court of Appeal's per curiam affirmance in Hayden v. State, is reported at 380 So.2d 588 (Fla. 2d DCA 1979) (App. 6).

JURISDICTION

The judgment of the Second District Court of Appeal of Florida was entered November 30, 1979 (App. 6). A timely petition for rehearing was filed and subsequently denied on January 11, 1980 (App. 7). Thereafter, a timely petition

for a writ of certiorari was filed with the Supreme Court of Florida and subsequently denied on August 15, 1980 (App. 8). On October 6, 1980, this Court extended the time in which to petition for certiorari to and including November 13, 1980 (App. 9). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right

to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens or the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

Section 893.13 Prohibited Acts; penalties.--*

(1)(a) Except as authorized by this chapter and chapter 500, it is unlawful for any person to sell, manufacture, or deliver, or posses with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), or (4) is guilty of a felony in the third degree, punishable as provided in s. 775.081, s. 775.083, or s. 775.084; except that the sale, delivery, or possession of in excess of 100 pounds of cannabis as controlled in s. 893.03(1)(c) shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

* * *

(d) It is unlawful for any person to bring into this

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*Florida Statutes, Section 893.13(1)(a) 2 has been subsequently amended to authorize a special sentencing structure in cases involving in excess of 100 pounds of canabis, pursuant to Florida's new "Trafficking" statute. § 893.135, Fla. Stat., Chapter 79-1, Laws of Florida.

state any controlled substance unless the possession of such controlled substance is authorized by this chapter or unless said person is licensed to do so by the appropriate federal agency. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 893.03(1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

* * *

Section 370.021 Administration, rules, regulations, etc.

(1) Rules and regulations.--The department of natural resources shall make, adopt, promulgate, amend and repeal all rules and regulations necessary or convenient for the carrying out of the duties, obligations, powers and responsibilities conferred on said department or any of its divisions. The director of each division shall submit to the department suggested rules and regulations for that division. Any person violating or otherwise failing to comply with any of the rules and regulations adopted as aforesaid shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083, unless otherwise provided by law.

* * *

(5) Powers Of Officers.--* The department may designate such employees of the several divisions, as it may deem necessary in its discretion, as law enforcement officers, who shall meet the provisions of s. 943.13 and subsection 943.12(1) and have the powers and duties conferred in this subsection, except that such employees shall comply with the provisions of chapter 943. Such officers, together with the executive director and the director of the Division of Marine Resources, are constituted law enforcement officers of this state with full power to investigate and arrest for any violation of the laws of this state and the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder. The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the state for performance of their lawful duties and may

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*This section has now been amended by Chapter 79-65, Laws of Florida, to omit from the second sentence the words "Division of Marine Resources" and to add in their stead "Department of Law Enforcement".

take with them any necessary equipment, and such entry shall not constitute a trespass. It shall be lawful for any boat, motor vehicle, or aircraft owned or chartered by the department or its agents or employees to land on and depart from any of the beaches or waters of the state. Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliance, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any other warehouse, building, or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any saltwater products or contraband which have been unlawfully caught, taken, or processed or which are unlawfully possessed or transported in violation of any of the laws of this state or any rule or regulation of the department. Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of

the department, the provisions of chapter 253 and the rules and regulations promulgated thereunder, or any of the laws of this state. It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, either by abetting or assisting such resistance or otherwise interfering, with any such law enforcement officer while engaged in the performance of the duties imposed upon him by law or regulation of the department.

Florida Seafood Quality Control Code

16B-27.23 Inspection of boats engaged in transporting seafood in primary or secondary production.

The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood, as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health.

STATEMENT OF THE CASE

- - The Search and Seizure - -

This case arose from a search and seizure of a shrimpboat, "The Dudley",

by two officers of the Florida Marine Patrol predicated upon the authority of an administrative regulation authorizing agents of the Florida Department of Natural Resources to board, inspect and search boats engaged in transporting seafood as they deemed necessary. Rule 16B-27.23, The Seafood Quality Control Code. That provision allows warrantless searches without any requirement of probable cause, reasonable grounds, founded suspicion or any other objective restraint upon the discretion of the officers.

On February 21, 1977, "The Dudley", a shrimpboat, was anchored in Charlotte Harbor, located in Lee County, Florida (Tr.374). The boat was then carrying shrimp nets too large to be used legally for shrimping in Charlotte County (the county adjacent to Lee) but which nets were legal for use in Lee County waters or elsewhere (Tr.371).

A Florida Marine Patrol officer testified at the suppression hearing that at about 10:40 a.m. that morning, while he and his partner were cruising in a patrol boat, he saw "The Dudley". He observed that it seemed to be riding low in the water, noticed the size of the shrimp nets, and decided to board the boat and check her hold for possible violations of the Seafood Quality Control Act pursuant to the administrative regulation (Tr.430). The officer further testified that he had premised his right to board "The Dudley" on the belief that this administrative regulation gave him the right to board any commercial vessel within Lee County and search for possible violations of the Act without a warrant, and also because he "felt" like "something" might be on board (Tr.409).

The officers proceeded to "The Dudley" and requested permission from Captain Larry Rich, to board and inspect the

ship (Tr.445). Captain Rich explained that no shrimp was aboard and produced the ship's papers which the officers found satisfactory (Tr.367,368,430). Again the officers requested permission to board and, after receiving no response from Captain Rich, boarded "The Dudley" anyway (Tr.369). At this time, the officers observed that the shrimp nets on board were dry (Tr.429).

Twice permission was requested of Captain Rich to inspect the hold, but the officers received no reply (Tr.380). Then, just as the officers were readying to remove the hatch despite the lack of consent, Captain Rich stated, "Well, I might as well tell you, you're going to find out anyway, I've got something illegal down there . . . marijuana" (Tr.381). The Captain and the Petitioner, along with two other persons found aboard the shrimpboat (Messrs. Henry and Roth), were then arrested (Tr.383-384).

After the arrests, and after the officers advised their home base by radio that both the ship and its occupants were under their control, the officers proceeded to open the hold (Tr.387). The hold was protected by a larger, heavy outer hatch that required the strength of both officers to lift and by a second smaller hatch (Tr.380). Once these were opened, the officers observed crocker sacks of what looked and smelled like marijuana (Tr.308).

The ship was ordered to nearby phosphate docks (Tr.388). The arrestees were then taken to jail, booked, and their property secured in packages. "The Dudley" remained under the control and supervision of the Florida Marine Patrol.

While "The Dudley" remained docked, a Florida Marine Patrol investigator, again without a warrant, searched the ship's hold, galley, wheelhouse and cabin, and seized $13,000 found under a mattress

in the wheelhouse, and $5,000, a handdrawn map and a Mastercharge credit card from a drawer in the wheelhouse (Tr.483, 484). The following day, the suspected marijuana on board "The Dudley" was seized and removed (Tr.479, 483), prior to the issuance of a court order authorizing such action (Tr.480). Approximately one week later, a further search was made of "The Dudley", this time pursuant to a search warrant and remaining inconsequential evidence was seized (Tr.492).

- - The Trial - -

Following the suppression hearing in the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida, the Honorable Jack R. Schoonover presiding, the trial court denied Petitioner Hayden's motion to suppress (App. 1) (Tr.545). Petitioner then went to trial before a jury. According to the State's evidence, Petitioner met Larry Rich at

an Elks Club social gathering in Marathon, Florida. At that time, Petitioner was working as a part-time bulldozer operator in Marathon (Tr.239). When Petitioner, who had never been on a boat before, learned that Rich was the captain of a shrimpboat, he urged Rich to take him on a fishing trip (Tr.239). Approximately one month later, Captain Rich offered Petitioner a chance to go on his first boat trip, a trip to Honduras to pick up some freight (Tr.239). Petitioner accepted the invitation. At the docks just prior to shoving off, Captain Rich told Petitioner that they were going to Honduras to pick up a load of fish and that there was something illegal about the trip (Tr.240).

Two days after the ship had left Marathon, Captain Rich told Petitioner that they were really going to pick up a load of marijuana. Petitioner, in disbelief, told Rich he had to be kidding, he thought

they were going to Honduras to pick up lobster tails (Tr.240). Petitioner, who then did not know for sure where the ship was heading, found out Captain Rich was indeed not kidding, when, after the ship was anchored off a jungle covered shore, over one hundred naked and painted Indians approached the ship with canoes full of marijuana (Tr.240-241). After some of the Indians came on board, Captain Rich told Petitioner to help load so they could get out of there quickly. Petitioner, naturally apprehensive, complied (Tr.242)

After the ship was safely away from the jungle and the Indians, Petitioner told Captain Rich to let him off as soon as possible (Tr.242). The remainder of the trip was miserable for him, as a novice seaman he had to be told how to do anything on the ship, and he spent the major part of the time seasick and

not knowing where he was going (Tr.246). His reaction to the trip was in contrast to that of the regular crew, Henry and Roth, who were smoking some of the marijuana as well as stashing some for later personal use.

When the ship finally entered Charlotte Harbor, Petitioner asked Captain Rich to let him off or at least to get close enough to shore so that he could swim in (Tr.235). The captain, not wanting to let anyone go ashore who knew where he was or what he had on board, refused to let Petitioner off and instead anchored over a mile from land (Tr.244). Captain Rich, afraid that he might talk later also considered giving Petitioner part of the proceeds in order to involve him and keep him quiet; however, he never mentioned any pay to Petitioner (Tr.245).

At the close of the State's evidence and again at the close of all of the evidence, Petitioner moved for a judgment

of acquittal on the grounds that the evidence introduced by the State was insufficient to support a conviction, because, inter alia, the Petitioner did not have the requisite intent to commit the acts with which he was charged.

The trial court, over Petitioner's specific objections, refused to instruct the jury that the State must prove the Petitioner's behavior was intentional and willful in order to sustain a conviction under both counts of the Information (Tr.265, 266). In fact, the trial court's definition of the felony drug offenses did not contain any instruction on criminal intent (Tr.301, 302). The only mention of the element of intent was in connection with the trial court's instruction on the law of aiding and abetting (Tr.300). The jury returned a verdict of guilty to both counts of the Information (Tr.533, 534). Thereafter, Petitioner filed a timely motion for a new trial and/or

arrest of judgment (Tr.546-561) raising, inter alia, the unconstitutionality of §§ 893.13(1)(a)(2) and 893.13(1)(d)(2), Florida Statutes (Tr.547); the defectiveness of the trial court's charge to the jury on the issue of intent (Tr.546); and the insufficiency of the evidence to sustain the verdict (id.). This motion was denied (App. 2) (Tr.562). Thereafter, Petitioner was adjudged guilty and sentenced to four years' imprisonment for each charge, to be served concurrently, and, in addition, to a fine of $5,000 for the possession charge (App. 3-4) (Tr.563).

-- Lower Court Decisions --

Petitioner took a timely appeal to the Supreme Court of Florida. He raised the facial unconstitutionality of the statutes, the jury instruction issue and the insufficiency of the evidence as well as the search and seizure issues

presented in his motion to suppress. On June 14, 1979, the Supreme Court of Florida concluded "that Appellant's attack on the constitutional validity of Section 893.13(1)(a)2 and (1)(d), Florida Statutes (1977), is without merit", leaving that Court without jurisdiction. It thus transferred the case to the District Court of Appeal of Florida in and for the Second District for "resolution of all remaining points on appeal. . ." (App. 5). This decision is reported at 372 So.2d 444 (Fla.Sup.Ct. 1979). On November 30, 1979, the Second District affirmed Petitioner's conviction without opinion. Hayden v. State, 380 So.2d 588 (Fla.2d DCA 1979) (App. 6).

Parenthetically, the Second District Court of Appeal, on the same day it affirmed the trial court's order in the instant case, reversed and remanded for a new suppression hearing the companion case of a crew member. Dennis Allen Roth

v. State, 378 So.2d 794 (Fla.2d DCA 1979) (App. 11-18). The Second District there held that the administrative regulation upon which the Marine Patrol had relied in boarding and searching "The Dudley" was invalid and that State law prohibited inspecting and searching boats and vehicles engaged in transporting seafood without probable cause. The opinion stated:

> To the extent that this administrative regulation purports to permit a warrantless search without any probable cause, it is contrary to the controlling statute, Section 370.021(5) [Florida Statutes], and we hereby declare it invalid as beyond the quasi-legislative rule-making authority conferred upon the Department of Natural Resources by the Legislature.

The Second District Court of Appeal on the same day also affirmed without opinion the conviction of the appellant in a third companion case, Larry Rich

v. State, 380 So.2d 591 (Fla.2d DCA 1979) (App. 10).*

The suppression issues raised in all three cases were identical, as they arose from the same incident. The only distinction which supports the differing treatment of them by the Second District Court of Appeal was the trial court behavior in denying the motions to suppress. In Roth, the trial court gave a reason for its denial: that the regulation gave the Marine Patrol officers authority to board and search "The Dudley". In

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*A Petition for Writ of Certiorari was filed with this Court on October 4, 1980 in the companion cases of Larry Rich and Dennis Allen Roth v. State of Florida, Docket No. 80-557. That Petition raises the search and seizure issues addressed herein. However, both Messrs. Rich and Roth pleaded nolo contendere, reserving only suppression issues for appeal. Thus, the trial issues raised herein are unique to the instant Petition since Petitioner Hayden was the only crew member of "The Dudley" to proceed to trial on the merits.

Rich and the instant case, however, the trial court (a different presiding judge)* offered no reason for its denial of the motion.

On January 11, 1980, the Second District Court of Appeal denied Petitioner's timely motion for rehearing (App. 7). Thereafter, Petitioner filed in the Supreme Court of Florida a timely Petition for a writ of certiorari. On August 15, 1980, that court entered an Order which declared "it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied" (App. 8).

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*The cases of Rich, Roth and Hayden, were initially assigned to the same judge. Messrs. Rich and Hayden subsequently moved to recuse the judge and their cases were reassigned. Rich and Hayden were consolidated for purposes of a hearing on their motions to suppress.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED SINCE THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF CRIMINAL INTENT AND THE REVIEWING COURT'S AFFIRMANCE CONFLICT WITH THIS COURT'S DECISION IN STROMBERG V. CALIFORNIA, 283 U.S. 359 (1931) AND, FURTHER, INFRINGE THE RIGHT TO TRIAL BY JURY

Petitioner was denied his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution when the trial court, over objection, refused to instruct the jury that it must find intent to commit the crimes charged before returning a guilty verdict. This constitutional violation is even more pronounced since Petitioner's defense was his failure to form the requisite intent. The trial court's aiding and abetting charge -- which did include the element of intent -- did not cure the trial court's omission of the elements

of the substantive crimes since the jury's general verdict does not reveal whether Petitioner was convicted as an aider and abettor or as a principal. Stromberg v. California, 283 U.S. 359 (1931). Further, his right, under the Sixth and Fourteenth Amendments, to be found guilty only by a unanimous six person jury was infringed when the jury was incorrectly charged as to the elements of the principal offenses and not cured by the possibility that some of the jurors may have voted for conviction on an aiding and abetting theory, as to which the element of criminal intent was not omitted. Compare United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (federal jury verdict in criminal case must be unanimous as to the theory of guilt) with Burch v. Louisiana, 441 U.S. 130 (1979)(federal Constitution requires six person jury verdicts in state criminal cases to be unanimous).

More specifically, the trial court,

over the objection of defense counsel, refused to instruct the jury upon the element of criminal intent with regard to both the possession (§ 893.13(1)(a)2, Fla. Stat.) and importation (§ 893.13(1)(d), Fla. Stat.) charges contained in the Information (Tr.265, 266). Thus, the jury was permitted to convict Petitioner of two felonies on a theory of strict criminal liability.

With regard to the possession charge, § 893.13(1)(a)2, the statute itself seems unambiguously to incorporate the element of intent from the prefactory language contained in § 893.13(1)(a). And so Florida courts have repeated assumed. See Brainard v. State, 380 So.2d 1302 (Fla. 2d DCA 1980); Weaver v. State, 370 So.2d 1189 (Fla. 4th DCA 1979); State v. Paion, 374 So.2d 1070 (Fla. 3d DCA 1979); Wooten v. State, 361 So.2d 167 (Fla. 3d DCA 1978); State v. Caserta, 358 So.2d 1144 (Fla. 4th DCA 1978); Rushing

v. State, 355 So.2d 501 (Fla. 2d DCA 1978); cf., Ramirez v. State, 371 So.2d 1063, 1066 (Fla. 3d DCA 1979). Indeed, the Standard Jury Instructions in Criminal Cases (2d Ed. 1976) support the construction that § 893.13(1)(a)2 prohibits, inter alia, "possess[ion] with intent to sell, manufacture or deliver" ennumerated controlled substances, including cannabis. Standard Jury Instructions In Criminal Cases, 269 (2d Ed. 1976). Additionally, a portion of the same instruction identifies the simple crime of "actual or constructive possession of a controlled substance," as being prohibited by § 893.13(1)(e) only -- a statute the violation of which Petitioner was not charged. Id. Parenthetically, the Supreme Court of Florida has authorized the publication and use of these instructions with the disclaimer that "No effort is made to resolve questions of substantive law arising from obvious inconsistencies

in the statute". Id.; In the Matter of the Us by the Trial Court of the Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. Sup.Ct. 1976). Accord, State v. Pajon, 374 So.2d 1070, 1071-72 (Fla. 3d DCA 1979).

Putting aside the question of standard jury instructions, it is beyond dispute in the present case that criminal intent is an essential element of the crimes charged, for several reasons. First, Petitioner herein initially took a direct appeal from his conviction to the Florida Supreme Court contending that the statutes were facially unconstitutional because they imposed strict criminal liability by eliminating the element of intent; or, alternatively, if intent was an element, that the jury instructions given were constitutionally defective. The Supreme Court of Florida ruled that the attack on the statutes "is without merit," leaving the court without jurisdiction under

Article V, Section 3(b)(1), Florida Constitution, and thus transfered the jury instruction issue to the Second District Court of Appeal. State v. Hayden, 372 So.2d 444 (Fla. Sup.Ct. 1979) (App. 5). The rejection of the constitutional attack and the transfer of the jury instruction issue to the lower court amounts to a holding by the Florida Supreme Court that the statutes do not impose strict criminal liability but instead contain express or implied elements of criminal intent. Second, while the State never directly faced the issue as to how both §§ 893.13(1)(a)2 and 893.13(1)(d) should be construed, it finally did urge that since the aiding and abetting instruction expressly included criminal intent as an element, "The instructions as given reflect a complete statement of the law". Brief of Appellee at 20.* Third, inciden-

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*If the State of Florida should now argue that the two Florida Statutes involved here do not require intent after all, Petitioner will renew his argument that they are facially unconstitutional. See Point III, infra.

tally, the Second District Court of Appeal panel at oral argument herein voiced its view that intent was required but that the omission of intent from the basic instructions was cured by its inclusion in the instruction dealing with aiding and abetting.

Thus, in view of the Supreme Court's refusal to entertain this case on direct appeal, Hayden v. State, 372 So.2d 444 (Fla. Sup.Ct. 1979), and without even looking at the Second District's informal remarks about the basis for its per curiam affirmance of Petitioner's conviction, Hayden v. State, 380 So.2d 588 (Fla. 2d DCA 1979), we find a conviction in violation of basic constitutional principles, announced by this Court, designed to protect the right of trial by jury and due process itself. Stromberg v. California, 283 U.S. 359 (1931).

Stromberg directly stands for the proposition that, when a jury verdict

is a general one, and there are two possible theories of liability upon which it could have been based -- one proper and the other unconstitutional -- the verdict cannot stand. Id. at 369-70. "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground...would be to countenance a procedure which would cause a serious impairment of constitutional rights." Williams v. North Carolina, 317 U.S. 287, 293 (1942). At least in federal courts, "[t]he principle established in Stromberg has been consistently followed." Street v. New York, 394 U.S. 576, 586 (1969); Bachellar v. Maryland, 397 U.S. 564 (1979); Yates v. United States, 354 U.S. 298, 311, 317 (1957); Terminello v. Chicago, 337 U.S. 1, 5-6 (1949); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); United States v. Beasley, 585 F.2d 796 (5th Cir. 1978);

United States v. Driscoll, 449 F.2d 894 (1st Cir. 1971); United States v. Meriweather, 440 F.2d 753 (5th Cir. 1971); United States v. Scott, 425 F.2d 55 (9th Cir. 1970); United States v. Jakobson, 325 F.2d 409 (2nd Cir. 1963), aff'd., 380 U.S. 163 (1965). The Second District Court of Appeal's affirmance of Petitioner's conviction directly conflicts with these cases and the principle they represent.

When intent is an element of a crime, the jury must be instructed that the State has the burden of proving beyond a reasonable doubt that the intent actually exists. We thought this elementary proposition was settled long ago. Morrisette v. United States, 342 U.S. 246, 275 (1952).

The fact that the trial court did give an instruction on the law of aiding and abetting which included the element of intent cannot overcome this fundamental failure to define the principal offense to the jury in accordance with the law.

The general verdict returned by the jury on both Counts does not reveal whether the jury convicted Petitioner as an aider and abettor or as a principal. Thus, a verdict based upon the instructions given could have been predicated upon a finding that Hayden, although not possessing the requisite intent, was guilty as a principal of the crimes charged. There is no reason for one to assume that the jury attributed the intent element from the aiding and abetting instruction to the principal charge. Cf., United States v. Gomez, 375 F.2d 575 (7th Cir. 1967) (jury will not be presumed to have attributed erroneous instruction from one count to another). One cannot presume that the "lay jury will know enough to disregard the judge's bad law if in fact he misguides them". Polansky v. United States, 332 F.2d 233 (1st Cir. 1964), quoting, Bollenback v. United States, 336 U.S. 607, 613-614 (1946). In short,

Stromberg v. California, 283 US. 359 (1931), and its progeny ban judicial speculation that the incorrect instruction may have been disregarded.

Moreover, it is highly unlikely that the general verdict herein was returned upon an aiding and abetting theory of liability. The jury, during its deliberations, actually requested a further instruction on the elements of the crime of possession (Tr.544). No response was made by the trial court to this request.

The prejudice to the Petitioner in this case amounts to far more than a technical failure to instruct the jury on the elements it must find before convicting. Here, the omission of an instruction on the element of intent effectively swept away the Petitioner's theory of defense. Throughout the trial of this case Petitioner protested that he did not have the requisite intent to commit the crimes charged, and that he had been

held a virtual hostage after he had been informed that the pleasure trip he contemplated was actually a criminal venture. The State's star witness, Captain Rich, agreed that this was the case (Tr.235, 244). Thus, a lay jury, left with the impression that the State need not prove intent in order to carry its burden, may very likely have concluded that Petitioner had no legal defense.

The Court should hear this case because the decision below conflicts with innumerable decisions of this and other courts and with due process itself. It is simply not fair for a man to be convicted without any criminal intent under statutes requiring that intent.

Moreover, there are other important doctrinal reasons why certiorari should be granted. We submit that the Stromberg principle arises not only out of due process but also as an incident of the jury trial right protected by the Sixth and Fourteenth Amendments. Compare United

States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (federal jury verdict in criminal case must be unanimous as to the theory of guilt) with Burch v. Louisiana, 441 U.S. 130 (1979) (federal Constitution requires six person jury verdicts in state criminal cases to be unanimous).

Here, Petitioner was convicted by a unanimous six person jury. But there is no way of telling from the general verdict whether the jurors unanimously agreed that he was guilty on the alternative aiding and abetting theory (requiring criminal intent) presented in the instructions. Indeed, there is no way of telling whether they unanimously agreed that he was guilty on the theory presented in the Information filed against him, i.e., that he was a principal strictly liable for possession of cannabis. For all we know, three jurors embraced the aiding and abetting theory and three voted for strict liability as a principal.

The Sixth Amendment requires that

a federal jury be unanimous as to the theory of guilt relied upon for conviction. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Accord, United States v. Morris, 612 F.2d 483 (10th Cir. 1979); United States v. Lopez, 581 F.2d 1338 (9th Cir. 1978); United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978). This Court should now hold that the Sixth and Fourteenth Amendments require that a state jury be similarly in agreement. For a six person jury, the agreement should be unanimous. For larger juries, the constitutionally required number of jurors should be in agreement on the theory of guilt. Thus, in all cases, juries should be instructed so as to preclude adverse verdicts where, in true potential, too few jurors ever find the defendant guilty of anything which the law condemns. This case presently as appropriate vehicle for the Court to announce that protection as a part of the right to trial by jury in state court proceedings.

II.

CERTIORARI SHOULD BE GRANTED SINCE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THIS STATE COURT CONVICTION UNDER THE STANDARD ANNOUNCED BY THIS COURT IN JACKSON v. VIRGINIA, 443 U.S. 307 (1979)

As this Court has recently reemphasized "[t]he Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970)." Jackson v. Virginia, 443 U.S. 307 (1979). In Jackson, 443 U.S. at 318, this Court established:

> After Winship [397 U.S. 358 (1970)], the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

Accord, Moore v. Duckworth, 443 U.S. 713 (1979); Leonard v. California, 443 U.S. 914 (1979); Pijon v. Bordenkircher, 444 U.S. 1 (1979). Since Winship estab-

lishes the State's burden of proving the elements of a crime beyond a reasonable doubt as a federal due process guarantee to state criminal defendants, "[a] challenge to a State conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim." Jackson v. Virginia, 443 U.S. at 322. Petitioner herein raised his contention that the evidence was insufficient to sustain a conviction on both crimes with which he was charged by a motion for judgment of acquittal at the close of the State's case and at the close of all of the evidence (Tr.252, 263). These motions were denied. The insufficiency of the evidence was again raised by a motion for a new trial and/or arrest of judgment (Tr.546). This motion was also denied (Tr.562). A review of the record in this case discloses that, under

the standard set by Jackson v. Virginia, 443 U.S. 307 (1979), the evidence does not sustain Petitioner's conviction, and the trial court's denial of Petitioner's motion, and the Second District Court of Appeal's per curiam affirmance (App. 6) were in error, and effectively denied Petitioner due process of law.

A. The State Failed To Carry Its Burden Of Proving Petitioner Had Possession of the Cannabis Involved

As a matter of State law, in order to prove the element of possession contained in both §§ 893.13(1)(a)2 and (1)(d), Fla. Stat. (1977), the State had to prove by direct evidence both the accused's knowledge of the presence of cannabis and his ability to maintain dominion and control over it. Stephenson v. State, 371 So.2d 554 (Fla. 2d DCA 1979); Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979); Molinaro v. State, 360 So.2d 119 (Fla.

3d DCA 1978); Clark v. State, 359 So.2d 458 (Fla. 3d DCA 1978); Dixon v. State, 343 So.2d 1345 (Fla. 2d DCA 1977); Faggionato v. State, 329 So.2d 31 (Fla. 2d DCA 1976); Willis v. State, 320 So.2d 825 (Fla. 4th DCA 1975); Taylor v. State, 319 So.2d 114 (Fla. 2d DCA 1975); Smith v. State, 276 So.2d 91 (Fla. 4th DCA 1973). Also as a matter of State law, proof of these facts cannot rest on circumstantial evidence alone, Ramirez v. State, 371 So.2d 1063 (Fla. 3d DCA 1979); Clark v. State, 359 So.2d 458 (Fla. 3d DCA 1978); Barron v. State, 356 So.2d 876 (Fla. 4th DCA 1978); Townsend v. State, 330 So.2d 513 (Fla. 4th DCA 1976), "unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977). Accord Davis v. State, 90 So.2d 629 (Fla. 1956).

In the instant case, as the trial court correctly noted, conviction under

both statutes cannot be sustained unless the evidence proves beyond a reasonable doubt that Petitioner at least had possession of the cannabis involved (Tr.304). If the State did not prove Petitioner possessed the cannabis, then he cannot be guilty of bringing it into the state, as a matter of law. Here, the evidence produced by the State, consisting primarily of Petitioner's presence on "The Dudley" when it was seized and the testimony of its witness Captain Rich, fails to prove the essential element of possession, much less to exclude all reasonable hypotheses of innocence. To the contrary, the State proved that Petitioner is not guilty on all counts. The State proved that the Petitioner did not and could not exercise any dominion or control over the cannabis.

Captain Rich's testimony is unequivocal on the issue of control. As he testified on cross examination (Tr.247-48):

Q. From the time you picked up the marijuana and left Columbia until the time when you were arrested in Charlotte Harbor, is it a fact, sir, the defendant, Richard Hayden, never had any sort of control whatsoever over that marijuana?

Q. Do you understand my question? Did he have any control over it?

A. No. None of the crew had any control over anything.

Q. If Hayden had wanted to go away with some of that marijuana, take control of that marijuana, he'd have had to fight you to get control of it, wouldn't he.

A. I guess, yes.

The State's own witness made it abundantly clear that the accused had no authority to treat the marijuana as his own. Indeed the Petitioner would have had to use force to exercise control. Moreover, further testimony by Captain Rich clearly demonstrates that Petitioner had no desire to exercise any such dominion and control over "The Dudley's" cargo.

Captain Rich's testimony establishes

that Petitioner did not smoke any of the marijuana during the return trip (Tr.237). Neither did he take any for later personal use (Tr.246). In fact, he did not want anything to do with the marijuana (Tr.251). Rather, Petitioner only wanted off "The Dudley" as soon as possible (Tr.235, 242).

Only once did Petitioner come into real contact with "The Dudley's" cargo. While at anchor off a jungle-covered shore and faced by over 100 half-naked Indians, he responded to Captain Rich's plea for assistance in loading the cargo so they could get out of there quicker (Tr.241, 242). Such a reaction, one that any reasonable man would have made, cannot be considered as exercising the dominion and control necessary to sustain this conviction. We need hardly mention that this conduct took place on a South American coast, entirely outside the jurisdiction of the State of Florida.

B. The State Failed To Prove That Petitioner Had The Requisite Intent To Possess The Cannabis Or To Bring It Into The State

The record in this case is devoid of any evidence indicating any deliberate, willful or intentional effort on the part of Petitioner to possess or import cannabis. Since intent is an essential element of the crimes involved, see Point I, supra, the failure of the evidence to prove this element requires reversal as a matter of due process. Jackson v. Virginia, 443 U.S. 307 (1979).

Any contention by the State that Petitioner's mere presence on board "The Dudley" is sufficient to prove that he knowingly and intentionally possessed the contraband is erroneous. To the contrary, mere presence at the scene of a crime, United States v. Williams, 341 U.S. 58 (1951), indeed, even mere presence at the scene coupled with association with a culpable party, is not suffi-

cient proof of knowing, willful and intentional conduct. United States v. James, 528 F.2d 999 (5th Cir. 1976); United States v. Francomano, 554 F.2d 483 (1st Cir. 1977); cf., Ybarra v. Illinois, 444 U.S. 85 (1979).

Likewise, the facts adduced from Captain Rich's testimony fail to prove, to the exclusion of other reasonable hypotheses, that Petitioner knowingly, willfully and intentionally committed any crime. Jackson v. Virginia, 443 U.S. 307 (1979).

The State placed great weight on the fact that prior to "The Dudley's" departure Captain Rich told Petitioner that there was something illegal about the trip. However, whether the Petitioner was told that "The Dudley" was going for illegal freight (of an unspecified nature) as Captain Rich testified on re-direct (Tr.249), or for "short" lobsters (which also might be viewed as illegal freight), as Captain Rich testified on

cross-examination (Tr.240), there is no question that he was deliberately told nothing about marijuana.

In fact, there was no mention of an illegal purpose until just before "The Dudley" sailed. (Tr.250). Until that time, Petitioner had no reason to believe that the trip was anything more than the boat ride he had asked for when he first met Rich (Tr.239). Moreover, Petitioner's reaction, when he was finally told the truth, emphasizes his ignorance of "The Dudley's" true mission. As Captain Rich testified on cross-examination (Tr.240):

> Q. You were on that ship two days before you ever mentioned marijuana to him [Petitioner] weren't you?
>
> A. Yes, sir.
>
> Q. Because you didn't want him to be able to tell anybody ahead of time you were going to get marijuana, correct?
>
> A. Right.
>
> Q. What did he say when you said we're going to pick

up marijuana?

A. "You're kidding."

Q. He said, "You've got to be kidding," and didn't he say, "I thought you were going to pick up shorts in Honduras?"

A. That's what he said, yes.

While all this testimony may indicate that the Petitioner has human flaws, it most certainly does not indicate any guilty knowledge or criminal intent on his part concerning possession of marijuana or any other felony. More to the point, it is obvious that Captain Rich could not, in fact probably did not, expect much in the way of assistance from the Petitioner. Rich testified that he had more crew than he needed and that he could have gone without Petitioner (Tr.250-251). Moreover, Petitioner -- not knowing anything about boats or ships -- only helped when told when and what to do (Tr.246). On such facts it hardly appears that Petitioner was a

vital, willing member of the crew.

The State also placed great weight on Rich's testimony that the Petitioner helped load marijuana on "The Dudley" when she was anchored off the coast of Columbia. However, once again Rich's testimony, when viewed in its totality, is far from proof that Petitioner's actions were knowing, willful and intentional in any true sense of the words. As Rich testified, when "The Dudley" anchored off Columbia's jungle-covered shore, the boat was met by over 100 Indians (Tr.241). Some were naked, some wore loincloths and some had paint on their faces (Tr.241). Captain Rich, naturally apprehensive, told Petitioner "Help us load and we'll get out of here quicker" (Tr.242). Petitioner, hundreds of miles of open sea from Florida, and with no idea where "The Dudley" was next headed, helped (Tr.242). What would any reasonable man do?

No reasonable reading of this testimony could lead one to form a hypothesis that Petitioner's actions were willful, intentional or in any sense culpable. The only reasonable hypothesis is that Petitioner, reacting out of a rational fear for his life, helped load "The Dudley" to hasten his return to safety.

The remainder of Captain Rich's testimony for the State more than amply demonstrates the innocence of the Petitioner's actions. Rich testified that, even though Petitioner had no idea where the ship was headed when it left Colombia (Tr.243-44), he asked to be left off as soon as possible (Tr.243). Captain Rich did not honor this request because he did not want anyone on shore knowing what was aboard (Tr.244). Instead, he told Petitioner that "The Dudley" would be met by smaller boats and unloaded and, then, he could go ashore (Tr.244). Petitioner, not having any real choice in

the matter, had to wait. He did, however, renew his request when "The Dudley" came into Charlotte Harbor. In fact, Captain Rich's testimony is that Petitioner asked "Could I get off, just put me close enough to shore and I'll swim" (Tr.235). Again, this request was denied. Again, Petitioner was left with no alternative but to remain aboard "The Dudley".

In its closing argument, the State placed great emphasis on the fact that Petitioner was seasick when he asked to be let off "The Dudley"; that being seasick was the reason he wanted off, that he wanted land for his feet (Tr.286). This might be a plausible explanation for Petitioner's requests only if this Court were to shut its eyes to the rest of Captain Rich's testimony. In any event, seasickness is not a crime.

Further, in closing, the State also placed great emphasis on Captain Rich's testimony that he considered giving Peti-

tioner 20 percent of whatever he would realize from the sale of the marijuana (Tr.286, 287). While Rich may have considered such action, he never told Petitioner (Tr.245). Such consideration on the Captain's part is hardly indicative of Petitioner's guilty knowledge or criminal intent.

The State's evidence, particularly that of its star witness, Captain Rich rather than provide the basis for a reasonable hypothesis that Petitioner's actions throughout his travail aboard "The Dudley" were knowing, intentional and willful, clearly indicates that Hayden was no more than a scared, unwilling passenger. Put another way, on these facts the State has failed to show, on the part of Mr. Hayden, the "concurrence of an evil-meaning mind with an evil-doing hand". Morissette v. United States, 342 U.S. 246, 251 (1952). To the contrary, the State proved that Petitioner's role was an innocent one.

Since the State failed to carry its burden of proving Petitioner's actions were done with criminal intent, he never should have been convicted.

C. Conclusion

In conclusion, no reasonable jury could rationally deduce that the evidence was inconsistent with the reasonable hypothesis that Petitioner was no more than an innocent and unwilling passenger on "The Dudley". The record fails to show Petitioner either possessed the cannabis involved or that he had the requisite intent to commit the crimes with which he was charged. The conviction thus rests on suspicion and conjecture and does not accord with due process of law. We thus pray that this Court will grant certiorari and thus correct the miscarriage of justice that will occur unless this conviction is overturned. Jackson v. Virginia, 443 U.S. 307 (1979).

III.

CERTIORARI SHOULD BE GRANTED SO THIS COURT MAY ANNOUNCE THE LIMITS UPON THE POWER OF STATES TO IMPOSE SUBSTANTIAL CRIMINAL SANCTIONS UPON A THEORY OF STRICT LIABILITY FOR OFFENSES SUCH AS THE POSSESSION BASED DRUG CRIMES INVOLVED HEREIN

If the State should argue that either the possession statute (§ 893.13(1)(a)2, Fla. Stat.) or the importation statute (§ 893.13(1)(d)2, Fla. Stat.) impose criminal liability without the necessity of proving criminal intent, we will urge first that the State is mistaken. But if the statutes should be construed to impose strict criminal liability, we will then urge that the statutes are facially unconstitutional and, in light of the facts in this case, unconstitutional as applied. In view of the law in Point I, supra, and the State's election not to pursue strict liability theory in the Florida reviewing courts, we doubt that this Court will have to reach this issue. Nonetheless, out of an abundance of caution, we raise

and preserve it.

It is well-known that "[t]he existence of a mens rea is a rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951).

In Morissette v. United States, 342 U.S. 246 (1952), this Court reversed the decision of lower courts which had dispensed with the element of criminal intent under 18 U.S.C. § 641. In so holding, this Court, id. at 250-51, through Justice Jackson, stressed the importance of requiring criminal intent in statutory offenses:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished

> substitution of deterrence and reformation in place of retaliation and vengence as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." [Footnotes omitted]

This Court in Morissette, although making clear its disdain for strict liability offenses, did not set forth "comprehensive criteria for distinguishing between crimes that require a mental intent and crimes that do not." 342 U.S. at 260. However it did suggest that courts should "more explicitly . . . relate abandonment of the ingredient of intent, not merely with considerations of expedience in obtaining convictions . . . but with the peculiar nature and quality of the offense." 342 U.S. at 259. In doing so the court obviously intended to limit the state's power to create strict liability offenses to those crimes where "penalties commonly are relatively small and

conviction does no grave damage to an offender's reputation." 342 U.S. at 256. See United States v. United States Gypsum, 438 U.S. 422 (1978) (refusing to "construe the Sherman Act as mandating a regime of strict liability offenses," id at 436, and noting in support of such construction recent increases in the criminal penalties imposed for violation of the Act, id at 442, n.18 and the fact that the "conduct proscribed [by the Act] is difficult to distinguish from conduct permitted and indeed encouraged." Id. at 441 n.17).

For these reasons, the crimes for which Petitioner has been convicted should not be allowed to stand if they are conclusively construed as strict liability offenses. Section 893.13(1)(a)2, Fla. Stat., carries maximum penalties of fifteen years imprisonment and a $10,000 fine. Section 893.13(1)(d)2, Fla. Stat. carries maximum penalties of five years imprisonment and a fine of $5,000. Petitioner herein received a sentence of four years' imprisonment and

a $5,000 fine. Plainly, these statutes are not the type in which this court should "impute[] a regulatory purpose . . . in choosing to employ criminal sanctions, see e.g., United States v. Balint, 258 U.S. 250 (1922)." United States v. United States Gypsum, 438 U.S. 422, 442 (1978).

Further this Court, in emphasizing the "generally disfavored status," Gypsum, 438 U.S. at 438, of strict liability crimes, has indicated that the question whether the Constitution can permit liability for a particular crime without a requirement of mens rea must be answered by a review of the crime itself and the acts it prohibits. Id; Morissette v. United States, 342 U.S. 246, 256 (1952).

In considering the possessory-related crimes involved here, it is not surprising that numerous federal and state courts have held that such behavoir cannot justly and constitutionally be punished criminally without proving the guilty knowledge and intent of the actor. See United States

v. Craig, 552 F.2d 29 (6th Cir. 1975); United States v. Hutchinson, 488 F.2d 484 (8th Cir. 1973); United States v. Nichols, 401 F.Supp. 1377 (E.D.Mich. 1975). See also People v. Quiick, 544 P.2d 629 (Col. 1976); People v. Bennet, 515 P.2d 466 (Col. 1973); State v. Billocks, 574 P.2d 243 (Kan.App. 1978); State v. Faulkner, 551 P.2d 1247 (Kan. 1976); State v. West, 559 S.W.2d 282 (Mo.App. 1977); State v. Burns, 457 S.W.2d 721 (Mo. 1970); State v. Pedro, 83 N.M. 212, 490 P.2d 470 (N.M.App. 1971); State v. Minor, 224 S.E.2d 180 (N.C. 1976); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (S.C. 1974).

In "possession" crimes of the sort Petitioner has been convicted of, the actus reus requirement is highly attenuated and largely metaphysical. If criminal intent need not be proven, § 893.13(1)(a)2 would criminalize passive, non-volitional possession. Section § 893.13(1)(d)2 would reach circumstantial but non-intentional bringing into the State. Both statutes

would condemn behavior which is substantially innocent or incapable of being prevented. When the act requirement is so attenuated to begin with, dispensing with the mens rea requirement is unjust. Cf., Lambert v. California, 355 U.S. 225 (1957) (holding a Los Angeles ordinance imposing strict criminal liability for failure to register as a felon unconstitutional as a violation of due process). This Court, while historically giving wide latitude to legislatures in defining crimes and exacting criminal punishments, has warned that "this power is not without limitations." Smith v. California, 361 U.S. 147, 150 (1959).

One of those limitations, raised in another context but which has application here, is that the actus reus requirement must not be dispensed with, or any criminal sanctions applied will constitute cruel and unusual punishment, prohibited by the Eight and Fourteenth Amendments to the United States Constitution. Robinson

v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514, 533 (1968):

> The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.

Even if the statutes themselves pass constitutional muster without the element of intent, holding Petitioner criminally liable under the facts of this case would be unjust and should be condemmed as a violation of due process and the imposition of a cruel and unusual punishment. The actus reus requirement for the commission of criminal conduct is defined at common law as a muscular movement that results from an operation of the will. Holmes, The Common Law 54 (1881). See also, 1 Austin, Lectures on Jurisprudence 424 (4th Ed. 1879). Thus, the act itself must be accompanied by a mental state, i.e. a willing mind. The metaphysical

and highly attenuated nature of the act requirement in possessory crimes under the above definition has lead at least one commentator to conclude: "[t]hus, mens rea is the critical factor in these cases in determining the fact and time of the act of taking [possession]." J. Hall, General Principles of Criminal Law 207 (2d Ed. 1947). See also, Williams, Criminal Law: The General Part § 3 at 7 (1953) (evincing the belief that a statute which makes mere possession of a thing a crime, must still require proof of either "conscious retention of possession" or the "act of procuring" it).

Petitioner's only completely voluntary act in this criminal episode was agreeing to take what he had thought was a pleasure trip on "The Dudley". By the time he became aware that the trip's purpose was to transport cannabis, it was too late for him to extricate himself from the criminal venture. By acquiescing in Captain Rich's request for help in loading the

cargo in Columbia, he was not acting freely with the will to possess the cannabis, but rather assisted in order to escape from a potentially dangerous situation and to return more quickly to Florida where he could disassociate himself from the drug activity. Petitioner repeatedly requested to be allowed to leave the ship (Tr. 243, 235). He even requested that "The Dudley" be taken at least close enough to the Florida shoreline so he could swim in. (Tr. 235) These requests were denied. While still too far from shore to leave "The Dudley" or to advise authorities of the criminal activity aboard, he was arrested. Should a court be allowed to impose severe criminal sanctions upon such behavior? Has Petitioner, upon these facts, "committed some act, [or] engaged in some behavior, which society has an interest in preventing", Powell v. Texas, 392 U.S. at 533, with stiff criminal penalties? None of the policies supporting strict liability, as expressed in Morrisette

v. United States, 342 U.S. 246, 256 (1952), are fulfilled by these facts:

> The accused, [in a strict liability crime], if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

See generally Saltzman, Strict Liability and the United States Constitution: Substantive Law Due Process, 24 Wayne L.Rev. 1571 (1978).

Petitioner prays that this Court will grant review of his case, in order that he may more fully urge the unconstitutionality of imposing criminal sanctions upon him on a strict liability basis, if these statutes are construed to permit that dire result.

IV.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE REQUIREMENT OF A WARRANT TO SEARCH REPOSITORIES

OF PERSONAL EFFECTS FOUND IN AUTOMOBILES SHOULD BE SIMILARLY APPLIED TO THE SEARCH OF REPOSITORIES ABOARD A SHIP

In order to eliminate needless repetition of argument, Petitioner hereby adopts in its entirety Point I of the Petition for a Writ of Certiorari to the Second District Court of Appeal of Florida filed on or about October 4, 1980, in Larry Rich v. State of Florida and in Dennis Allen Roth v. State of Florida, Docket No. 80-557.

V.

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE FOR THE FIRST TIME WHETHER AN UNCONSTITUTIONAL SEARCH AND SEIZURE MAY BE RESUSCITATED BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE

In order to eliminate needless repetition of argument, Petitioner hereby adopts in its entirety Point II of the Petition for a Writ of Certiorari to the Second District Court of Appeal of Florida filed on or about October 4, 1980, in Larry

Rich v. State of Florida and in Dennis Allen Roth v. State of Florida, Docket No. 80-557.

VI.

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER BASIC PRINCIPLES OF ADMINISTRATIVE LAW, SPECIFICALLY THE CHENERY DOCTRINE, SHOULD APPLY TO JUDICIAL REVIEW OF SEARCHES AND SEIZURES

In order to eliminate needless repetition of argument, Petitioner hereby adopts in its entirety Point III of the Petition for a Writ of Certiorari to the Second District Court of Appeal of Florida filed on or about October 4, 1980, in Larry Rich v. State of Florida and in Dennis Allen Roth v. State of Florida, Docket No. 80-557.

VII.

CERTIORARI SHOULD BE GRANTED SINCE THE UPHOLDING OF THE SEARCHES AND SEIZURES IN THESE CASES CONFLICTS WITH SUPREME COURT PRECEDENT AND VIOLATES THE FOURTH AMENDMENT

In order to eliminate needless repeti-

tion of argument, Petitioner hereby adopts in its entirety Point IV of the Petition for a Writ of Certiorari to the Second District Court of Appeal of Florida filed on or about October 4, 1980, in Larry Rich v. State of Florida and in Dennis Allen Roth v. State of Florida, Docket No. 80-557.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,*

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*Counsel gratefully acknowledges the assistance of Laurel D. White, third year student at the University of Miami School of Law.

APPENDIX

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

vs. CASE NO. 77-188CF TWS

RICHARD HAYDEN

O R D E R

THE Defendant's Motion to Suppress (Tangible Objects) having come on for hearing, and the Court having been advised in the premises on both the facts and the law respecting the said Motion, it is therefore,

ORDERED AND ADJUDGED that the aforesaid Motion is Denied.

DONE AND ORDERED, in Chambers, at Fort Myers, Lee County, Florida this 30th day of September, 1977.

" ss/ Jack R. Schoonover "
Circuit Judge

* * *

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

vs. CASE NO. 77-188CF JRS

RICHARD HAYDEN

O R D E R

HAVING HEARD the argument of counsel and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED the Defendant's Post-Trial Motion (Motion for a New Trial and/or Arrest of Judgment) is denied.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida this 25th day of November, 1977.

" ss/ Jack R. Schoonover "
Circuit Judge

* * *

SENTENCE AND JUDGMENT FORM

* * * *

LEE COUNTY CIRCUIT COURT MINUTE
BOOK 22 PAGE_____

STATE OF FLORIDA)
)
VS.) CASE NO. 77-188CF JRS
)
RICHARD EVERETT HAYDEN)
Defendant

The State appeared by its Assistant State Attorney, Peter D. Ringsmuth.

The Defendant appeared in person in open court and with his attorney, David L. Orosz, Esquire, having been FOUND GUILTY AS CHARGED on September 29, 1977.

The Defendant being before the court, in person, in custody, in open court was informed of the accusation against him and of the judgment and penalty and his right of appeal therefrom, and was asked by the Court whether he had any cause to show why the judgment of the Court and the sentence of the law should not now be pronounced upon him, and he saying nothing sufficient, The Court pronounced the following judgment and sentence upon him:

You having ****been tried and found guilty of the offense of: COUNT I BRINGING INTO STATE A CONTROLLED SUNSTANCE, COUNT II POSSESSION OF IN EXCESS OF ONE HUNDRED (100) POUNDS OF A CONTROLLED SUNSTANCE.

It is the judgment of this court that you are guilty of this said offense,

and it is the judgment of the Court and the

sentence of the law, that you, RICHARD EVERETT HAYDEN for your said offense, do be punished by confinement in the State Prison for a period or term of FOUR (4) YEARS as to COUNT I, FOUR (4) YEARS as to COUNT II, each CONCURRENT with the other and with credit of 5 days for time served and that you pay a FINE of $5000.00 as to COUNT II, to the LEE COUNTY FINE & FOREFITURE FUND.

You are remanded to the custody of the sheriff of Lee County, Florida

Date: February 3, 1978

" ss/ Jack R. Schoonover "
Judge

* * * *

SUPREME COURT OF FLORIDA

No. 53,353

RICHARD HAYDEN, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[June 14, 1979]

PER CURIAM.

Upon consideration of the briefs and record in this cause, we conclude that appellant's attack on the constitutional validity of Section 893.13(1)(a) 2 and (1)(d), Florida Statutes (1977), is without merit, and that this case should be transferred to the District Court of Appeal, Second District, for the resolution of all remaining points on appeal properly raised and preserved below.

It is so ordered.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ.,concur

* * * *

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

RICHARD HAYDEN, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 79-1450

Opinion filed November 30, 1979

Appeal from the Circuit Court
for Lee County,
Jack R. Schoonover, Judge.

Joseph Beeler, Miami,
for Appellant.

Jim Smith, Attorney General,
Tallahassee, and William I.
Munsey, Jr., Assistant Attorney
General, Tampa, for Appellee

PER CURIAM.

Affirmed.

GRIMES, C.J., and BOARDMAN and
RYDER, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JANUARY 11, 1980

RICHARD HAYDEN,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 79-1450
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

Counsel for appellant having filed a motion for rehearing in the above-styled cause, upon consideration, it is

ORDERED that said motion is hereby denied.

* * * *

SUPREME COURT OF FLORIDA

Friday, August 15, 1980

RICHARD HAYDEN, Petitioner, vs. STATE OF FLORIDA, Respondent	)	CASE NO. 58,661 District Court of Appeal, 2nd District Case No. 79-1450

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, ACTING C.J., BOYD, OVERTON, ALDERMAN AND McDONALD, JJ., Concur

* * * *

SUPREME COURT OF THE UNITED STATES

No. A-296

RICHARD HAYDEN,

Petitioner,

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 13, 1980.

" /s/ Lewis F. Powell, Jr. "
Associate Justice
of the Supreme Court
of the United States

Dated this 6th
day of October, 1980

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LARRY RICH,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 79-244
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed November 30, 1979

Appeal from the Circuit Court for Lee County; Jack R. Schoonover, Judge.

Joseph Beeler, Miami, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Richard G. Pippinger, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

GRIMES, C.J., and BOARDMAN and RYDER, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DENNIS ALLEN ROTH, Appellant,	)	
v.	)	Case No. 79-243
STATE OF FLORIDA, Appellee.	)	

Opinion filed November 30, 1979

Appeal from the Circuit Court for Lee County; Thomas W. Shands, Judge.

Joseph Beeler, Miami for Appellant.

Jim Smith, Attorney General, Tallahassee and Robert J. Landry, Assistant Attorney General, Tampa, for Appellee.

RYDER, Judge.

On the morning of February 21, 1977, believing there was a violation of the Laws of Florida pertaining to seafood quality control, Florida Marine Patrol Officers approached the

The Dudley, a shrimp boat at anchor in Charlotte Harbor, boarded it, conducted a search without a warrant and seized a large quantity of marijuana from the hold. Several individuals on board The Dudley, including appellant, were arrested.

Thereafter, appellant was charged by a two count information with feloniously bringing cannabis into Florida and felonious possession of cannabis in excess of 100 pounds, violations of Section 893.13, Florida Statutes. Appellant pleaded not guilty and moved to suppress all evidence on the grounds that it was obtained by an unlawful search and seizure. An evidentiary hearing on appellant's motion to suppress was held on June 20, 1977. In sum, the Florida Marine Patrol Officers testified they believed at the time they boarded The Dudley that shrimp or other seafood was unlawfully on board and/or that there was a violation of seafood quality control. The officers also testified as to their reasons for arriving at this belief. Testimony was

also given regarding the seizure of the quantity of marijuana from The Dudley's hold.

At the conclusion of the suppression hearing, the trial judge stated, "Gentlemen, I don't know why we even had this hearing. The statute gives the officer the authority to go in. ...I think there is no question they were obligated to search that boat. The statute gives them the power to do so. And to differ with the attorneys, it doesn't say 'probable cause' at all. Those words are not used in the statute. It says they have the authority without a search warrant to enter if they believe that fish or any saltwater products are taken or kept on board -- they have that authority. ...I will deny your motion." Subsequently, a written order denying the motion to suppress evidence was entered.

Appellant then changes his plea of not guilty to nolo contendere, reserving the right to appeal the issue of the denial of his motion to suppress. Appellant was adjudicated guilty and sentenced to a term of 365 days in

the Lee County Jail.

Appellant now challenges the denial of his motion to suppress evidence and advances several points of argument. We hold that error of reversible proportions occurred and remand for a new hearing on the suppression motion.

With due respect, it is our view that the trial court misconstrued and misapplied the law by failing to employ the standard of probable cause in determining the suppression issue, as mentioned above. The statute referred to by the trial judge which is material to a disposition of this case is Chapter 370, "Saltwater Fisheries and Conservation", charging the Department of Natural Resources with various duties and empowering the Department and its officers with certain necessary authority. Specifically, Section 370.021(5), Florida Statutes (1977) provides in pertinent part:

> "(5) POWERS OF OFFICERS. - The department may designate such employees of the several

> divisions, as it may deem necessary in its discretion, as law enforcement officers ....of this state with full power to investigate and arrest for any violations of the rules and regulations of the department under their jurisdiction... . Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat... or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. ...Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, ... or any of the laws of this state."
> [Emphasis added.]

Although the trial court correctly noted that the statute quoted above does not expressly use the term "probable cause", it erred in apparently overlooking the case of

Hill v. State, 238 So.2d 608 (Fla. 1970) in which the Florida Supreme Court construed Section 370.021(5), Florida Statutes (1967), which did not differ in any material way from the current section. Our supreme court held that the "reason to believe" limitation on the authority of the officers to search the boat, without a search warrant, was equivalent to a requirement of probable cause to believe that a conservation rule or law was being violated.

Thus, a determination of whether the marine patrol officers had the lawful statutory authority pursuant to Section 370.021(5) to search The Dudley without a warrant depends upon whether the officers had probable cause to do so. The trial court erred by not applying this standard to the evidence adduced.

In this regard, we note here that the legal authority of the marine officers to search the boat without warrant must derive from Section 370.021(5), Florida Statutes, quoted above, and not from the particular rule adopted by the Department of Natural Resources

on the same point, to wit, Seafood Quality Control Code Rule 16B-27.23 which states:

> "Inspection of boats engaged in transporting seafood in primary or secondary production.
>
> The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health."

To the extent that this administrative regulation purports to permit a warrantless search without any requirement of probable cause, it is contrary to the controlling statute, Section 370.021(5), and we hereby declare it invalid as beyond the quasi-legislative rule-making authority conferred upon the Department of Natural Resources by the legislature. This fundamental principle of law is stated in 2 Am.Jur.2d Administrative Law § 300 (1962),

"Administrative rules and regulations, to be

valid, must be within the authority conferred upon the administrative agency. ...To the extent that a regulation is not in conformity with the statute and with controlling judicial interpretations of the statute it conflicts with the meaning of such statute and so is unauthorized; and regulations must conform, not only with the statute under which they are issued, but also with the constitution and other laws." See also DeThorne v. Beck, 280 So.2d 448 (Fla. 4th DCA 1973); Florida Growers Coop Transport v. Department of Revenue, 273 So.2d 142 (Fla. 1st DCA 1973).

In view of this disposition of this cause, we need not address the other arguments raised by appellant.

Accordingly, we REVERSE the judgment and sentence appealed from and REMAND this cause for a new hearing on appellant's motion to suppress in accord with the standards set forth in this opinion.

GRIMES, C.J., and BOARDMAN, J., Concur.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-789

RICHARD HAYDEN,

Petitioner

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT
OF APPEAL, FLORIDA

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In The

SUPREME COURT OF THE UNITED STATES

No. 80-789

RICHARD HAYDEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT
OF APPEAL, FLORIDA

QUESTIONS PRESENTED

1. WHETHER, CONSISTENT WITH THE SIXTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S DECISION IN *Stromberg v. California*, 283 U.S. 359 (1931), A TRIAL COURT CAN REFUSE TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED, TO WIT, CRIMINAL INTENT, AND AN APPELLATE COURT AFFIRM THE RESULTING CONVICTION WHEN THERE IS NO WAY OF TELLING FROM THE JURY'S GENERAL VERDICT THAT IT DISREGARDED THE

ERRONEOUS LAW AND INSTEAD CONVICTED ON THE BASIS OF AN ALTERNATIVE THEORY OF GUILT, TO WIT, AIDING AND ABETTING, AS TO WHICH IT WAS CORRECTLY INSTRUCTED?

2. WHETHER THE RECORD EVIDENCE IS SUFFICIENT TO REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT WHEN THE PROSECUTION'S OWN EVIDENCE SHOWS THAT PETITIONER NEVER EXERCISED DOMINION AND CONTROL OVER THE MARIJUANA ON THE SHIP AND THAT HE NEVER HAD ANY INTENT TO POSSESS OR IMPORT THE MARIJUANA?

3. WHETHER THE EIGHTH AND/OR FOURTEENTH AMENDMENTS ARE VIOLATED BY STATE PENAL STATUTES CONSTRUED AND APPLIED TO IMPOSE STRICT CRIMINAL LIABILITY AND SEVERE FELONY PENALTIES UPON A NON-INTENTIONAL, UNWITTING AND UNWILLING INDIVIDUAL -- IN THIS CASE A PASSENGER

ON A MARIJUANA SMUGGLING SHIP -- FOR POSSESSION BASED DRUG CRIMES?

4. WHETHER ONCE A SHIP IS REDUCED TO THE DOMINION AND CONTROL OF THE AUTHORITIES, IT IS IMMOBILIZED AND NO EXIGENT CIRCUMSTANCES REMAIN, MAY WARANTLESS SEARCHES OF AND SEIZURES FROM THE SHIP'S REPOSITORIES NONETHELESS BE CONDUCTED WITHOUT OFFENDING THE FOURTH AMENDMENT?

5. WHETHER SEARCHES MADE BY OFFICERS AND PURSUANT TO AN UNCONSTITIONAL AND INVALID ADMINISTRATIVE REGULATION AUTHORIZING THEM TO CONDUCT WARANTLESS SEARCHES WITHOUT PROBABLE CAUSE, ARTICULABLE SUSPICIONS, OR ANY OTHER STANDARD OF INDIVIDUALIZED OBJECTIVE FACTS CAN, CONSISTENT WITH THE POLICIES OF THE FOURTH AMENDMENT, BE VALIDATED

AFTER THE FACT BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE SUBSTITUTED FOR THE OFFICERS'OWN EXERCISE OF PROPER DISCRETION?

6. WHETHER THE ADMINISTRATIVE LAW DOCTRINE THAT "THE GROUNDS UPON WHICH AN ADMINISTRATIVE ORDER MUST BE JUDGED ARE THOSE UPON WHICH THE RECORD DISCLOSES THAT ITS ACTION WAS BASED", *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1947), SHOULD BE INCORPORATED INTO FOURTH AMENDMENT LAW AS A RULE BY WHICH THE ACTIONS OF OFFICIALS SHOULD BE REVIEWED AT HEARINGS UPON A MOTION TO SUPPRESS EVIDENCE?

7. WHETHER THE INITIAL BOARDING AND SEARCH OF THE SHIP IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE?

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OPINIONS BELOW

The Florida Supreme Court's decision in *Hayden v. State* is reported at 372 So. 2d 444 (Fla. 1979). The per curiam affirmation in *Hayden v. State* is reported at 380 So. 2d 588 (Fla. 2d DCA 1979).

JURISDICTION

To the extent that a substantial federal question may be presented, jurisdiction is properly invoked under 28 U.S.C. §1257(3)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

Section 893.13 Prohibited Acts: penlaties. ---1

(1)(a) Except as authorized by this chapter and chapter 500, it is unlawful for any person to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 891.03 (1)(c),(2)(c),or (4), is guilty of

---

1/ Florida Statutes, Section 893.13(1)(a) 2 has been subsequently amended to authorize a special sentencing structure in cases involving in excess of 100 pounds of cannabis, pursuant to Florida's new "Trafficking" statute. §893.135 (Fla. Stat., Chapter 79-1, Laws of Florida.

a felony in the third degree, punishable as provided in s. 775.081, s. 775.083, or s. 775.084; except that the sale, delivery, or possession of in excess of 100 pounds of cannabis as controlled in s. 893.03(1) (c) shall constitute a felony of the second degree, punishable as provided in s. 775.-082, s. 775.083 or s. 775.084.

* * *

(d) It is unlawful for any person to bring into this state any controlled substance unless the possession of such controlled substance is authorized by this chapter or unless said person is licensed to do so by the appropriate federal agency. Any person who violates this provision with respect to:

* * *

2. A controlled substance named or described in s. 893.03 (1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

* * *

(e) It is unlawful for any person to be in actual or constructive possession of a controlled

substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or 775.084.

* * *

Section 370.021 Administration, rules, regulations, etc.

(1) Rules and regulations. -- The department of natural resources shall make, adopt and promulgate, amend and repeal all rules and regulations necessary or convenient for the carrying out of the duties, obligations, powers and responsibilities conferred on said department or any of its divisions. The director of each division shall submit to the department suggested rules and regulations for that division. Any person violating or otherwise failing to comply with any of the rules and

regulations adopted as aforesaid shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or 775.-083, unless otherwise provided by law.

* * *

(5) Powers of Officers, ---[2] The department may designate such employees of the several divisions, as it may deem necessary in its discretion, as law enforcement officers, who shall meet the provisions of s. 943.13 and sub section 943.12(1) and have the powers and duties conferred on this subsection, except, that such employees shall comply with the provisions of chapter 943. Such officers, together with the executive director and the director of the Division of Marine Resources, are constituted law enforcement officers of this state with full power to investigate and arrest for any violation of the laws of this state and

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2/ This section has now been amended by Chapter 79-65, Laws of Florida, to omit from the second sentence the words "Division of Marine Resources" and to add in their stead "Department of Law Enforcement".

the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder. The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the state for performance of their lawful duties and may take with them any necessary equipment, and such entry shall not constitute a trespass. It shall be lawful for any boat, motor vehicle, or aircraft owned or chartered by the department or its agents or employees to land on and depart from any of the beaches or waters of the state. Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliance, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any other warehouse, building, or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter

transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any saltwater products or contraband which have been unlawfully caught, taken, or processed or which are unlawfully possessed or transported in violation of any of the laws of this state or any rule or regulation of the department. Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, the provisions of chapter 253 and the rules and regulations promulgated thereunder, or any of the laws of this state. It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, either by abetting or assisting such resistance or otherwise interfering with any such law enforcement officer while engaged in the performance of the duties imposed upon him by law or regulation of the department.

Florida Seafood Quality Control Code

16B-27.23 Inspection of boats engaged in transporting seafood in primary or secondary production.

> The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood, as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health.

STATEMENT OF THE CASE

-- The Search and Seizure --

At the hearing on the motion to suppress evidence obtained from the shrimp boat, the "Dudley," there was the following testimony:

Marine Patrol Officers McCroan and Harn were on routine patrol on February 21, 1977, and saw a large shrimp boat anchored just inside the pass in Charlotte Harbor, Lee County, Florida (R. 358-361, 443-444). The name on the boat was the "Dudley." (R.361). The outriggers were in a down position

(R. 361, 444). The boat appeared to be loaded - it was riding low in the water (R. 361-364,458). Boats in that area are usually smaller and use bait shrimp nets (R. 371,444). In the Charlotte County area of Charlotte Harbor, the law limits the size of the troll nets to 25 feet in width in order to keep large shrimp boats out of the harbor and to keep them from raking out the bottom with larger nets (R.371-372). The "Dudley" had long nets hanging from the rigging, which were larger than the usual 25 foot troll nets (R.373,444). The Charlotte County area of Charlotte Harbor has a grassy bottom and that is what makes shrimping worthwhile (R. 435). The Marine Patrol officers had been receiving complaints

about "shrimpers" in Charlotte Harbor (R.374,423). Although the boat was riding low in the water, the freezer unit motor could not be heard to be running (R.411). The "Dudley" had a commercial registration for the State of Florida on the bow of the vessel (R.364-365). When a vessel has a commercial decal, it shows that they are making more than fifty percent of their income in commercial fishing (R. 434). The patrol officers tied their boat to the stern of the "Dudley" and asked to see the vessel's registration papers (R.366-369). After checking the registration papers, the officers asked the captain if he had shrimp on board (R.366-369). The captain said that he did not (R. 369,445). The officer stated

that he boarded the vessel to check for quality control violations (R.403,406-407). The fact that Captain Rich said he had nothing aboard, although the vessel was sitting low in the water, made the officer feel that Rich was lying to him (R. 408). The officer thought that there were shrimp aboard, that the vessel was loaded with shrimp (R. 404). The officer then stated that prior to boarding the vessel, he did not hear the freezer running and he heard no bilge water being pumped out (R.415-416). This indicated a violation of the quality control code (R.415). Normally, if a vessel has ice aboard, it will be melting and is pumped out of the hold as it melts (R.416). In the absence of the sound of a

refrigerator motor noise or of bilge water being pumped out, the officer said it would indicate either that there was no ice on board or that the shrimp were floating in bilge water down in the hold (R.416). Shrimp are potentially hazardous since seafood spoils (R. 416-417). Part of a Marine Patrol officer's duties is concern with getting the product to the consumer in a wholesome manner (R.418).[3] A Marine Patrol officer can board a commercial vessel and search it for quality control code violations without a warrant (R. 431). The officers

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3/ The officers had previously testified that among other things, the duties of the Marine Patrol were to check vessels carrying seafood to see that the seafood was properly iced if it were a food source and to see that bait shrimp permits were not being used for food shrimping (R.375).

told the captain they would like to come aboard and received no response even when they again requested to come aboard (R. 369-370). The officers boarded the stern of the vessel where Captain Rich was standing (R. 380). One officer followed Rich around to the middle hold of the vessel, which was what the officer wanted to check (R. 380). When asked for permission to look into the hold Rich again did not respond (R. R.380). Nor did Rich respond to a second request (R.380-381). As the officers started to open the hold, Captain Rich advised them that he had "something illegal down there", that it was "marijuana" (R. 381). One officer stayed with Captain Rich and the other went toward the wheelhouse to call the

crew to assemble (R.381-382). The captain and crew were placed under arrest (R.383). They were given their Miranda rights (R.383,448-452). The officers checked the hold - they saw and smelled what appeared to be marijuana (R. 388,421). The vessel, with its captain and crew were taken to the phosphate docks at Boca Grande (R. 388). While they were getting underway, Captain Rich offered the officers "$20,000 cash money," and guaranteed delivery of a million more - he reached for a drawer in the vessel and opened it (R.389). The officer saw a plastic baggy of marijuana in the drawer (R. 387). Captain Rich picked it up and said, "Huh, there's another baggy." (R. 388-390). The officers had Rich put the baggy back in the drawer and close it

(R.390). At the dock, the four people comprising the captain and crew, were put in cars from the Sheriff's Department and taken to the Lee County Jail (R. 390-391).[4] The "Dudley" was in the custody of the Marine Patrol and officers searched it for money to use as evidence (R.476-477). Large amounts of money were found under a mattress pad as well as in a drawer in the pilot house (R. 477). There was a hand drawn map of a coastline and a charge card belonging to Captain Rich that was found in a wallet in another drawer in the pilot house (R.477-478). The officers had been notified to look for between $18,000 and $20,000, which

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4/ While en route to the jail, Captain Rich said he wished the officers had taken the money, and Petitioner Hayden said that he too wished they had. (R. 378)

was what was found (R. 477,485).[5] The marijuana was offloaded from the "Dudley." (R. 479). Some newspapers and portions of cardboard boxes were found in the bales during the offloading (R.480). Subsequently, on March 1, 1977, a search warrant for the "Dudley" was executed (R. 491-492).

The trial court denied the motion to suppress evidence (R. 545).

-- The Trial --

At the trial, there was testimony showing that over 17 tons of marijuana had been brought in on the "Dudley."

5/ No testimony about the money was introduced by the prosecutor at the trial (R. 166). He had instructed the witness not to go into this topic (R. 166).

(R.98, 159-160).[6] The "Dudley" was loaded with marijuana so that the galley and the pilot house were the areas left for living (R. 164-165).

Captain Rich testified about being approached on a million dollar importation deal (R. 229-230). He planned to make the trip on his boat, the "Dudley", with a crew of three men, i.e. Dennis Henry, Dennis Roth and Richard Hayden (R. 230-231). Prior to leaving, Captain Rich did not tell Petitioner Hayden what he was going to do, but said that he was going on a long boat trip for an illegal purpose (R. 231). Petitioner was told this before the boat left the dock (R. 231-232.) Petitioner

6/ There was in excess of 100 pounds of "clean" marijuana in the courtroom in front of the jury (R. 8-11).

was persistent in wanting to go even after being told that the "Dudley" was going for illegal purposes (R.249). The boat left Marathon, Florida and went to Colombia, South America to get a load of marijuana (R.232). In Colombia, the boat was anchored close to shore and the marijuana was brought out to it in small dugout boats (R. 233). Petitioner Hayden helped in loading the "Dudley" (R. 233-234). At no time did Petitioner Hayden say that he did not want to help with loading the "Dudley." (R. 236). Working for two or three hours each day, the loading took two days (R. 234). During the trip, Petitioner Hayden was seasick (R. 234,242). On the way back, he

asked to be let off as soon as possible (R. 242). The "Dudley" was to be offloaded in Florida waters on February 20th, the day before they were arrested (R. 234). Small boats were to have come out and transported the bales of marijuana (R. 234-235). While the "Dudley" was in Charlotte Harbor, Petitioner Hayden expressed a desire to get off the boat - he asked to be put in close enough to shore and he would swim (R. 235). Knowing that the boats were supposed to come out that night to unload the "Dudley", Captain Rich told Petitioner Hayden that after the offloading, Hayden could get off (R. 235). Captain Rich did not want to be sitting in the harbor with 17 tons of dope

and was apprehensive when the boats did not come out to meet the "Dudley." (R. 237-238). The proceeds of the trip were to be divided with the crew; however, prior to their arrest, Captain Rich had not talked to Petitioner Hayden about dividing up the proceeds (R. 235-236). If Captain Rich had gotten a million dollars, Petitioner Hayden's share would have been $200,000 (R. 236). While in the boat, Petitioner Hayden was offered some marijuana, but declined it, as did Captain Rich (R. 236-237). Rich could not have made the trip without a crew and while he did not need that large a crew, he was planning on sharing the cash realized from the marijuana (R. 250). As

to the marijuana itself, no one could have taken it from Rich without overpowering him, but any crew member could have some for his owm use as well as sharing in the proceeds from its sale (R. 249-250). Captain Rich said that he was still friends with Petitioner Hayden (R. 237).

Among other things, the jury was instructed as follows:

1. The charges were (1) importation and (2) possession, in excess of 100 pounds, of a controlled substance, i.e. cannabis (R. 298).

2. The charges included the lesser offenses of (1) possession,or constructive possession of cannabis in an amount more than five grams but less than a hundred pounds, and

(2) possession, or constructive possession of, less than five grams of cannabis (R. 298-299).

3. The defendant's position was stated as that the State has not proved that he had actual or constructive possession or even that he had knowledge that cannabis was aboard the ship. This was followed by an instruction that if the State has not proved both that he knew the cannabis was aboard the ship and proved that he personally possessed the substance or maintained ability to control the substance, the jury must acquit the defendant (R. 299-300).

4. The instruction on aiding and abetting was given with the caveat that in order for one to be guilty of

a crime physically committed by another, it is necessary that he had a conscious intent that the criminal act shall be done and that pursuant to that intent he do some act or say some words which were intended to and which did incite, cause, assist, or encourage another person to actually commit the crime (R. 300-301).

5. The essential elements of Count I are that defendant did knowingly and unlawfully and feloniously bring into the State of Florida a substance described in the information, i.e. cannabis, and that the substance so brought in was, in fact, cannabis (R. 301).

6. As to Count II, the essential elements are that defendant did have

actual or constructive possession of a controlled substance, i.e. cannabis, and that the substance so possessed was, in fact, cannabis (R. 301-302).

7. In addition to the definition of "possession", "actual possession" and "constructive possession" were defined, as well as "joint possession". The definition of constructive possession includes the additional element of knowledge, as well as the ability to maintain control (R. 302-303).

8. Penalty instructions were given:

(a) Count I subjected the defendant to a maximum penalty of up to five years in the state prison and/or a fine of $5000.

(2) Under Count II, the possession of more than 100 pounds of cannabis carried a penalty of up to fifteen years in the state prison and/or a fine of up to $10,000. The lesser included offense of possession of more than five grams, but less than 100 pounds, carried a penalty of up to five years and/or a fine up to $5,000. The lesser included offense of possession of less than five grams carried a penalty of up to one year in the county jail and/or a fine in the amount of $1,000 (R.303-304).

9. The instruction was given that if defendant was not guilty of possessing cannabis, then, as a matter of law, he was not guilty of bringing

it into the State (R. 304).

Petitioner was found guilty as charged as to both counts. He was sentenced on each count, with the sentences to run concurrently (R.363).

REASONS WHY THE WRIT SHOULD BE DENIED

I

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON THE ESSENTIAL ELEMENT OF CRIMINAL INTENT AND THE REVIEWING COURT'S AFFIRMANCE CONFLICT WITH THIS COURT'S DECISION IN *STROMBERG V. CALIFORNIA*, 283 U.S. 359 (1931) AND, FURTHER, INFRINGE THE RIGHT TO TRIAL BY JURY.

Petitioner asserts denial of due process and of his right to trial by jury, which claims allegedly arose from failure to instruct the jury on criminal intent as an essential element of the offenses charged. He cites *Stromberg v. California*, 283 U. S. 359 (1931) in support of his position. However, the *Stromberg* decision was predicated on a charge and jury instructions which left the door open for the accused to be convicted of a section of the law which was unconstitutional. It was unknown whether the accused's conviction was based on violation of constitutional parts of the law or of the unconstitutional section contained in the law. No such question is presented by the

instant case.

Petitioner was charged with (1) importation of contraband and (2) possession under Section 893.13,Florida Statutes (1977). He asserts that criminal intent is an essential element of the crimes charged. Therefore, he argues the failure to instruct the jury on the element of criminal intent gave rise to constitutional deprivation. Even assuming, arguendo, that this were true, relief could be had in federal habeas court. Habeas corpus will lie to set aside a conviction where the jury instruction rendered the proceedings fundamentally unfair, *Pleas v. Wainwright*, 441 F.2d 56 (5th Cir. 1971); *Higgins v. Wainwright*, 424 F. 2d 177 (5th Cir. 1970).

In any event, Petitioner's argument rests on an *a priori* assumption. In construing Section 893.13, the Florida Supreme Court held that where the statute does not specifically require criminal intent, the intent is inferred from the doing of the act. The State does not have to allege and prove intent. It is not an essential element of the crime. Lack of knowledge is an affirmative defense. However, where the possession is constructive, rather than actual, the State must prove knowledge.[7] See *State v. Medlin*, 273

7/ In the instant case, the jury was instructed as to the requisite knowledge element of constructive possession, as well as being instructed that it must find knowledge as an element of the importation charge (R. 301-303). Furthermore, the jury was instructed on the theory of the defense, to wit: lack of knowledge (R. 299-300). The jury was also told that if it found that Petitioner did not possess the contraband, it could not find that he imported it (R. 304).

So. 2d 394 (Fla. 1974).

Petitioner contends that as to the possession charge, intent is implicit in the language of Section 893.13(1)(a) 2. Granted, the jury was instructed as to the penalties for possession of contraband in excess of 100 pounds as set out in this Section. However, Petitioner was charged simply with possession of more than 100 pounds of cannabis (R.335). The information did not allege that the possession was "with the intent to sell, manufacture, or deliver", as proscribed under Section 893.13(1)(a)1. Given the language of the instant information, Petitioner was not charged pursuant to Section 893.13(1)(a)1. He was charged with mere possession under Section 893.13

(1)(e). See *Reinersman v. State*, 382 So. 2d 325 (Fla. 2d DCA 1980); *Beasley v. State*, 382 So. 2d 47 (2d DCA 1980); *State v. Brady*, 379 So. 2d 1294 (Fla. 4th DCA 1980); *Schueren v. State*, 370 So. 2d 83 (Fla. 1st DCA 1979); *Chewning v. State*, 366 So. 2d 144 (Fla. 1st DCA 1979); *Aylin v. State*, 362 So. 2d 435 (Fla. 1st DCA 1978).[8]

8/ The only question in Florida is whether one who has been charged with possession of contraband in excess of 100 pounds can be punished more severly than the third degree felony provided in Section 893.13(1)(e). The Florida Supreme Court has granted certiorari to decide whether the penalty provision of Section 893.13(1)(a)2 is applicable to the mere possession of more than 100 pounds of cannabis. This is a question of statutory interpretation. The Second District Court of Appeal held that it was not. See *Reinersman v. State, supra; Beasley v. State, supra.* The Fourt District held that the penalty of Section 893.13(1)(a)2 was applicable. See *State v. Brady, supra.* The cases pending before the Florida Supreme Court are *State v. Brady*, Case No. 59,054; *State v. Reinersman*, Case No. 59,097; *State v. Beasley*, Case No. 59, 085. In any event, this question is moot as to Petitioner. He was sentenced to four years on the possession charge (R. 563). This is within the statutory maximum of five years for a third degree felony under Section 893.13(1)(e).

On the basis of the foregoing authorities, Petitioner has wholly failed to demonstrate that the jury verdict rested upon an unconstitutional ground. He was charged with possession, the jury was instructed on the law of possession, and he was convicted of possession. It is irrelevant that the jury was instructed as to the possible penalty under Section 893.13(1)(a)2.

As to the offenses of possession and importation, the statute does not make intent an essential element of the crime. Intent is inferred from the doing of the acts.[9] Petitioner has not

9/ Respondent notes that the same type of reasoning is true of the crime of involuntary sexual battery. Intent is inferred from the doing of the act, although consent is an absolute defense (with the exception of statutory rape). There is no requirement that the jury be instructed as to intent. *Askew v. State*, 118 So. 2d 219 (Fla. 1960).

brought this case within the ambit of the first issue presented.

II

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE STATE COURT CONVICTION UNDER THE STANDARD OF *JACKSON V. VIRGINIA*, 443 U. S. 307 (1979).

Respondent is unable to see how sufficiency of the evidence presents a substantial federal question upon which this Court should grant certiorari. The decision in *Jackson v. Virginia*, 443 U. S. 307 (1979), provides for federal habeas review of the evidence adduced to support a conviction. The *Jackson* rule requires that when the evidence is viewed in the light most

favorable to the prosecution, it must show guilt beyond a reasonable doubt. This question can be resolved by a petition for habeas corpus in the federal district court.

III

CERTIORARI SHOULD NOT BE GRANTED IN ORDER FOR THE COURT TO LIMIT THE STATE'S POWERS TO IMPOSE CRIMINAL SANCTIONS UPON A THEORY OF STRICT LIABILITY FOR OFFENSES SUCH AS POSSESSION OF CONTRABAND.

Petitioner seeks to have this Court grant certiorari on the ground that it violates the constitution for states to hold those who possess and import contraband as strictly liable and to impose criminal sanctions.

This question is not presented by the instant case. Under Florida law, lack of knowledge is a defense to the crime of possession. *State v. Medlin, supra.* Where the defense of lack of knowledge may be raised, absolute or strict liability is not imposed. *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, (1971).

IV

CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE THE QUESTION OF WHETHER THE REQUIREMENT OF A WARRANT TO SEARCH REPOSITORIES OF PERSONAL EFFECTS FOUND IN AUTOMOBILES SHOULD BE SIMILARLY APPLIED TO THE

SEARCH OF REPOSITORIES
ABOARD A SHIP.

Following Petitioner's suit, Respondent hereby adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

V

CERTIORARI SHOULD NOT BE GRANTED IN ORDER TO DETERMINE FOR THE FIRST TIME WHETHER AN UNCONSTITUTIONAL SEARCH AND SEIZURE MAY BE RESUSCITATED BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE.

The instant case does not present an unconstitutional search and seizure

which was resuscitated by a hindsight judicial determination of probable cause. At the hearing on the motion to suppress evidence, the prosecutor argued that the question was whether the Marine Patrol officers had probable cause to believe there was a violation of the quality control code and he presented evidence of same.

In the alternative, Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

VI

CERTIORARI SHOULD NOT BE GRANTED IN ORDER TO DETERMINE WHETHER BASIC PRINCIPLES OF ADMINISTRATIVE LAW, SPECIFICALLY

THE *CHENERY* DOCTRINE, SHOULD APPLY TO JUDICIAL REVIEW OF SEARCHES AND SEIZURES.

Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

VII

CERTIORARI SHOULD NOT BE GRANTED ON THE GROUND THAT UPHOLDING THE SEARCH AND SEIZURE IN THIS CASE CONFLICTS WITH SUPREME COURT PRECEDENT AND VIOLATES THE FOURTH AMENDMENT.

The record shows that the initial boarding of the ship was supported by probable cause.

In the alternative, Respondent adopts in its entirety the answer to this question as filed by the state in *Larry Rich and Dennis Allen Roth v. State of Florida*, Case No. 80-557.

CONCLUSION

The instant petition for writ of certiorari presents no substantial federal or constitutional issue and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EULA TUTTLE MASON, Counsel for Respondent, and a member of the Bar of the United States, hereby certify that on the 18th day of December, 1980, I served three copies of the Brief of Respondent on Joseph Beeler, Esquire, Suite 900, 28 W. Flagler St., Miami, Florida 33130 by a duly addressed

envelope with postage prepaid.

Eula Tuttle Mason

EULA TUTTLE MASON
Assistant Attorney
General.